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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ABDULLAH DOHAISH, *Petitioner*,

v.

DALE TOOLEY, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Whether a state prosecutor is a "court of last resort" when exercising his prosecutorial discretion in not prosecuting an accused murderer where evidence of probable cause is available or has been established at a preliminary hearing.

II

Whether a state prosecutor may, when exercising his discretion, base his decision not to prosecute an accused murderer on suspect criteria such as race, religion, nationality or national origin.

III

Whether a father has standing to bring an action under the Constitution and Civil Rights statutes against a state prosecutor who intentionally fails to prosecute the accused murderer of his son because of criteria such as the race, religion or national origin of the father and son and where probable cause

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OPINION BELOW

The Judgement and Opinion of the United States Court of Appeals for the Tenth Circuit is found in Appendix A hereto, infra, page 1. The Order of Dismissal of the Unites States District Court for the District of Colorado is found in Appendix B hereto, page 1.

JURISDICTION

The judgement of the United States Court of Appeals for the Tenth Circuit was entered on February 16, 1982. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTION, TREATIES AND STATUTES

This case involves Article VI, clauses 2 and 3 of the Constitution of the United States of America. Said clauses read in relevant part as follows:

"This Constitution, and the laws of the United States which shall be made in Pursuance

thereof; and all Treaties made or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution. . ."

This case also involves United States Treaty 20.3.2804 TIAS 6749. Article IX of said treaty reads as follows:

"Each Government shall use its best efforts to extend to citizens of the other country engaged in activities pursuant to this agreement such favorable treatment with respect to entry, travel, duty free entry of

personal effects, residence and exit as is consonant with its national laws and regulations."

STATEMENT OF THE CASE

Pursuant to Public Law 80-497, approved July 8, 1966 (80 Stat. 271; 1 U.S.C. 113), the United States of America and Saudi Arabia entered into a bilateral treaty, to wit, "Agreement For Cultural Exchange Between The United States and Saudi Arabia. U.S.T. 20.3.2804 TIAS 6749. ("the Agreement"). The said international agreement was signed at Jidda, Saudi Arabia on July 25, 1968 and entered into force on July 25, 1968. Under Article II of the Agreement, the two governments shall promote and faciliate the interchange . . . of prominent citizens, professors, teachers, technicians, students. . . etc. More specifically Article IX of the Agreement provides as follows:

"Each Government shall use its best efforts to extend to citizens of the other country engaged in activities pursuant to this agreement such favorable treatment with respect to entry, travel, duty-free entry

of personal effects, residence and exit as is consonant with its national laws and regulations."

Pursuant to the above international treaty, Petitioner's son, Saud Dohaish entered into the United States on a Saudi government scholarship. Furthermore, Saud Dohaish's entry and presence in the United States was sponsored through the Saudi Arabian Educational Mission to the United States, whose director is the Saudi Arabian Educational Attache to the United States.

In October 1977, Saud Dohaish entered into the United States where he was admitted to the Bridge International School of Colorado Women's College, Denver, Colorado, to study the English language.

As part of his studies, Saud Dohaish, as well as other foreign students needing competence in the English language, were encouraged to speak with native Americans to enhance their spoken English.

On the night of July 28, 1978, Saud Dohaish and a few of his Saudi friends were invited to another Saudi student's house for dinner. However, because there was not enough food for everyone, Saud Dohaish and three (3) of his friends travelled to a nearby McDonald's for hamburgers. After eating, Saud Dohaish and his friends went to play pocket billiards ("pool"), a favorite Saudi game, at a local establishment, Caesar's Nite Club. Saud Dohaish was a good billiards player and beat a number of people at the establishment. While Saud Dohaish's friends meandered to another part of the establishment, apparently Saud and a man by the name of Eddie Santistevan played or were playing a game. Saud Dohaish was struck in the forehead with a sharp object at approximately 1:30 A.M., July 29, 1978.

At approximately 3:30 A.M. on July 29, Detective John L. Weber of the Denver Police Department assigned to the Homicide Bureau,

went to the hospital on a report of an assault. Officer M.S. Newell reported to Detective Weber that upon arrival at the hospital, Saud Dohaish was unconscious and was listed as critical with a severe blow to the head. Detective Weber then met with one of Saud Dohaish's friends, Yousif Barrak, who was present at Caesar's. Mr. Barrak, who spoke very little English, told Weber that Saud told him that a man had hit him with a pool cue because he had won a pool game.

Later on the morning of July 29, 1978, Detective Rudolf Sandoval of the Denver Police Assault Detail was assigned to the case.

Saud Dohaish expired at Mercy Hospital on August 7, 1978, never having regained consciousness. Dr. William Warmath had diagnosed Saud's injury as an acute subdural hematoma leaving one small cortical type of tear anteriorly over the temporal tip of Saud's brain. Dr. Warmath was willing to testify to the cause of death being a

massive acute subdural hematoma.

On August 8, 1978, Detective Weber was reassigned to the homicide of Saud A. Dohaish. That day, Detective Weber drove to Caesar's, 100 Santa Fe Drive, and interviewed the owner/manager Albert Maestas. Mr. Maestas informed Detective Weber that he and his wife, Gloria Maestas, were sitting at the bar near the pool table. Mr. Maestas told Weber that Saud Dohaish was playing pool with an unknown customer he described as a Spanish-American male, 22 or 23 years of age, 5'9" tall, 145 pounds, light brown hair, medium length, wearing blue jeans, a white T-shirt and tennis shoes. Oddly, Mr. Maestas represented to Detective Weber that the suspect was not an illegal alien. Maestas said that after a game between the men, Santistevan was walking away from the table when Saud either pushed or grabbed the suspect's shirt. At this point Maestas related Santistevan struck Saud on the head with the tip of a pool cue. Saud,

Maestas related, had a pool cue in one hand and a pool ball in the other at the time he was struck. After being struck, Maestas said Saud threw the ball to the floor and left the establishment with his three (3) friends. After Saud was struck, Maestas said that he attempted to aid the victim by securing a bar towel to stop the bleeding. Maestas said he then notified the Denver police and went outside with Saud. Santistevan and a friend of his ran out of the bar prior to the arrival of the police at approximately 12:15 A.M. Maestas stated that the lounge was very quiet that night and that a bartender by the name of George Sandoval was present at the time of the assault. He then stated he would give the police Sandoval's address and telephone number when secured.

Later, the evening of August 8, Detectives Morgan and Crutchley of the Crime Laboratory, returned to Caesar's and photographed the interior and exterior.

The next day, Detective Weber travelled to the home of Mr. and Mrs. Maestas. Mr. Maestas admitted that he had not been candid during their interview the previous day. Mr. Maestas said that he knew the suspect by name as the suspect had been a former employee of his. He then identified the suspect as Eddie Santistevan and reported his address. Mr. Maestas stated he was reluctant to become involved in the case because he feared for the safety of his wife, business and himself. Maestas told Detective Weber that the victim's death had been seiously bothering him and that he did see the suspect strike Saud on the forehead with a pool cue. Mr. Maestas said that when the blow was struck the cue broke in half. Mrs. Maestas, on the other hand, said that she was in the office behind the bar when she heard a loud noise. When she came out, she saw the victim bleeding and Eddie standing near the pool table with a broken pool cue in his hand.

On August 10, 1978, County Court Judge George Manerburg (sic?) issued an arrest warrant for Eddie W. Santistevan. Detective Weber arrested Santistevan at the suspect's home and transported him to the Homicide Bureau where he was advised of his constitutional rights. Santistevan first declined to make a statement concerning the incident. While Detective Weber was writing the arrest slip, Santistevan began making voluntary statements about the assault. Santistevan stated twice, "it was self defense." Detective Weber asked Santistevan if he now wanted to make a statement about the incident. Santistevan replied that he did, before being advised of his rights again. Santistevan made a written statement in which he stated that he struck the victim with a pool cue after the victim lunged at him. Santistevan was thereafter placed in Denver City Jail.

On August 11, 1978, the Denver Police Department presented the case to the office of

the District Attorney for the filing of criminal charges. The first degree murder charge was reduced to a second degree charge shortly thereafter.

It was during the middle part of August, 1978, that Petitioner Abdullah Dohaish learned of his son's death. The Saudi Arabian Educational Mission to the United States ("the Mission"), located in Houston, Texas, inquired into the circumstances of the death of one of its students and the legal processes concerning the accused murderer. Special attention by the Mission was directed to hearing dates and trial settings. Numerous requests were made on behalf of the Mission to the District Attorney's office to be made aware of trial dates and settings so that a representative from the Mission could observe the proceedings.

On October 16, 1978, in Criminal Action No. 131711-16, styled the People of the State of Colorado, Plaintiff, v. Eddie Santistevan, Defendant, a preliminary hearing was held

in the County Court in and for the City and County of Denver, State of Colorado. Judge George A. Manerbino presided. Although there were at least eight (8) witnesses who were present in the night club the night of the incident and who could have been called as witnesses, the prosecutor chose only the night club owner, who took the 5th Amendment when questioned about his relationship with Santistevan, and the owner's wife. After holding the case bound over for trial, however, the Denver District Attorney's office moved to dismiss the charges against Santistevan. Consequently, Judge Manerbino dismissed the second degree murder charge against Santistevan.

On February 21, 1979, the Saudi Arabian Educational Attache to the United States learned of the actions of the District Attorney's Office in dismissing the charges against Santistevan. Shortly thereafter, the Saudi Attache directed a letter to

Respondent Dale Tooley requesting a reconsideration of the dismissal of charges. (Appendix C, attached). On March 12, 1979, however, Respondent Tooley directed a reply letter to the Saudi Attache wherein he misstated the law with respect to preliminary hearings and the facts that were available to him. (Appendix D, attached). Respondent declined to reopen the case and stated that "justice would not be served by the further prosecution of Mr. Santistevan."

After conversations with Respondent's office by Petitioner by and through his attorney and after an investigation of the facts and circumstances of the incident, Petitioner filed his complaint in the United States District Court of Colorado on February 23, 1981. In said complaint Petitioner alleged the instant action arose under the United States Constitution, particularly under the provisions of the Fourteenth Amendment and under the laws of the United States,

particularly under Title 42 of the United States Code, Sections 1981, 1983, 1988 2201 and 2202. Petitioner alleged Respondent had abused his discretion in not prosecuting the killer of his son and requested injuctive relief, declaratory relief and damages (nominal and punitive) among other things.

On February 25, 1981, Petitioner filed his Amended Complaint with a copy of the statement of facts of the preliminary hearing that took place on October 16, 1978, in the County Court in and for the City and County of Denver, State of Colorado, entitled The People of the State of Colorado v. Eddie W. Santistevan, Crim. Action No. 131711-16.

On March 17, 1981, Respondent filed his Motion to Dismiss alleging absolute immunity under the doctrine in Imbler v. Pachtman, 424 U.S. 409 (1976).

On March 18, 1981, all parties were notified by the District Clerk that a hearing on the Motion to Dismiss was set at 8:15 A.M.

on April 15, 1981.

The District Court dismissed Petitioner's complaint on April 15, and on May 14, 1981, Petitioner filed his notice of appeal.

On June 8, 1981, Petitioner filed his docketing statement with the Clerk of the Court of Appeals.

On June 30, 1981, the Clerk of the Court of Appeals granted Petitioner an extension of time to file his brief up to and including July 24, 1981. On or about July 24, 1981, Petitioner filed his brief with the Clerk of the Court of Appeals.

On July 30, the Clerk granted Respondent an extension of time to file his brief up to and including August 28, 1981. On or about August 28, 1981, Respondent filed his Answer Brief with the Court of Appeals.

Petitioner filed his Reply Brief with the Court of Appeals on September 14, 1981.

On Tuesday, February 2, 1982, the Court of Appeals heard oral argument at Special

Session in Denver, Colorado. During oral argument, an order was entered directing Appellant Dohaish "to file supplemental authorities within five days; appellee to respond within ten days." Judges Barrett, Doyle and Logan made up the panel. Petitioner filed Supplemental Brief of Appellant on February 8, 1982. The Court of Appeals for the Tenth Circuit affirmed the decision of the lower court on February 16, 1982.

REASONS FOR GRANTING THE WRIT

I

A state prosecutor should not be a "court of last resort" when exercising his prosecutorial discretion in not prosecuting an accused murderer where evidence of probable cause is available or has been established at a preliminary hearing.

A. The Role of the Judiciary Under the Constitution.

Adhering to constitutional principles is, of course, not the sole province of the

judiciary. In our tripartite system, the three branches are coequal, and the Constitution is superior to each branch. The supremacy of the Constitution, the supremacy of the "consent of the governed," requires that each branch adhere to constitutional principles in the exercise of its powers. Ideally, constitutionally, the judiciary measures the other branches' adherence to constitutional principles only secondarily, after the primary measure of adherence has been taken by the coequal branch itself. Thus, the prosecutor's decision to prosecute must always be made with constitutional limits on discretion in mind. Then, the judiciary performs the very limited role of secondarily measuring the primary decision of the prosecutor against constitutional standards.

In United States v. Nixon, 418 U.S. 683 (1974), Chief Justice Burger writing for an

unanimous Court, summarized this basic aspect of our tripartite form of government. In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. Id. at 703. However, in the historical land mark decision of Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803), the Supreme Court, hold that it is emphatically the province and duty of the judicial department to say what the law is. Id., at 177. See also U.S.C.A. Const. art. 6, cl. 2. It is clear then that a prosecutor's discretion must be reviewable by the judiciary.

B. The Law Regarding Immunity of Prosecuting Attorneys.

1. Imbler v. Pachtman

In Imbler v. Pachtman, 424 U.S. 409 (1976) the Supreme Court held that a prosecutor is absolutely immune from suit for

malicious prosecution under 42 U.S.C. Section 1983 as he enjoyed at common law. Id., at 424-431. However, absolute immunity does not generally bar federal injunctive and declaratory relief. Mitchum v. Foster, 407 U.S. 255 (1972).

Although the Supreme Court did not directly address the issue, it did recognize lower federal court decisions that had denied absolute immunity to prosecutors engaged in investigative or administrative activities. Imbler v. Pachtman, supra, at 430-431. Based on these lower court decisions, when the conduct of a prosecutor falls into one of these categories, it is deemed beyond the scope of his quasi-judicial authority and he, then, is entitled only to the qualified immunity afforded other governmental officials. Jacobson v. Rose, 592 F.2d 515 (9th Cir. 1978), cert. denied, 442 U.S. 930 (1979); and Walker v. Cahalan, 542 F.2d 681 (6th Cir. 1976), cert. denied, 430

U.S. 966 (1977). Qualified immunity places the burden on the official to defend his actions, and to avoid liability, the prosecutor must establish his good faith and the reasonableness of his behavior in light of the circumstances. Imbler v. Pachtman, supra, at 419 n. 13 (citing Scheuer v. Rhodes, 416 U.S. 232, 238-239 (1974) and Wood v. Strickland, 420 U.S. 308, 320-322 (1975)).

In determining whether the same considerations of public policy that underlie the common law rule likewise countenance absolute immunity under Section 1983 and the facts in Imbler, the court found that they did. Imbler v. Pachtman, supra, at 424. There are at least three reasons that underlie the Supreme Court's finding of a heightened danger of influence on the exercise of prosecutorial discretion. Id., at 418-419, 424-427. First, since a prosecutor is more likely to be sued when he decides to prosecute, the desire to avoid

liability would always slant a prosecutor's conduct toward fewer prosecutions, which clashes with the prosecutor's public duty to enforce the law vigorously. Id, at 424-428.

Secondly, since prosecutors are faced with an identifiable potential plaintiff each time they decide to prosecute an individual, such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Id, at 425. Thus, damage claims against prosecutors may drain a disproportionately large amount of prosecutorial time. Id, at 425, 426.

Thirdly, and most importantly, since various post-trial procedures are available to determine whether an accused has received a fair trial, the ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to liability under Section 1983. Id, at 427. The

remedial powers of the trial judge, appellate review and state and federal post-conviction collateral remedies are some such available post-trial procedures. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. Id. The Supreme Court went on to hold that such a focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might, result in the prosecutor's being called upon to respond in damages for his error or mistaken judgement. Id.

2. Butz v. Economou.

A more recent Supreme Court decision that analyzes the factors relevant to immunity determinations is Butz v. Economou, 438 U.S. 478 (1978). The value of Butz with respect to the instant appeal lies in its clarification of the considerations upon which Imbler relied. Although Butz

concerned Department of Agriculture officials who had conducted an administrative hearing, since such officials exercised discretion similar to that of judicial officers, the Supreme Court held them to be absolutely immune. Butz v. Economou, supra, at 511-517.

Three major factors are to be balanced when deciding whether an official is entitled to absolute or qualified immunity. First, the prosecutorial discretion must be related to adjudicatory proceedings, i.e., activities which are intimately associated with the judicial phase of the criminal process. Id, at 511. Second, the grant of absolute immunity is only warranted when it is likely that, in its absence, the prosecutor will be the target of retaliatory suits. Id, at 512. The Court found that the loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. Id. Finally, the Supreme

Court recognized that safeguards must be available to deter the prosecutor from misusing his authority. Id. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process and the correctability of error on appeal are just a few of the many checks on malicious action by prosecutors in their quasi-judicial role. Id. In fact, the Court focused on the challenges to the prosecutor's assertions by defense counsel through cross-examination and rebuttal, the scrutiny of his decision to commence the action during the trial proceeding itself, and the jury's decision whether to accept the credibility of any evidence presented for its deliberation. Id, at 516-517.

Thus, the focus on the availability of checks as outlined in Butz v. Economou indicates that the broad implications of

Imbler v. Pachtman are subject to limitation. For example, a murderer should not be allowed to go free solely on the caprice of a state prosecutor.

II.

A state prosecutor may not, when exercising his discretion, base his decision not to prosecute an accused murderer on suspect criteria such as race, religion, nationality or national origin.

In United States v. Johnson, 577 F.2d 1304 (5th Cir. 1978), the Court of Appeals held that it was proper to deny a prosecutor's motion to dismiss when his exercise of prosecutorial discretion is so abusive as to encroach on constitutionally protected rights since the judiciary must protect against unconstitutional deprivations. Id, at 1307. In United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974), the leading case on selective prosecution, the Court of Appeals held that to support a defense of selective prosecution, a defendant bears a

heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the discriminatory selection of him has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. Id, at 1211. See United States v. Johnson, supra, and United States v. Bennett, 539 F.2d 45, 54 (10th Cir.), cert. denied, 429 U.S. 925 (1976); United States v. Dog Crow, 532 F.2d 1182, 1196 (8th Cir. 1976), cert. denied 97 S.Ct. 1547 (1977); United States v. Bourque, 541 F.2d 290, 292-293 (1st Cir. 1976); United States v. Oaks, 527 F.2d 937, 940 (9th Cir. 1975), cert. denied, 426, U.S. 952 (1976); United States v. Peskin, 527 F.2d 71, 86 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976); and United States v.

Berrigan, 482 F.2d 171, 176-182 (3rd Cir. 1973).

In United States v. Kelley, 556 F.2d 257 (5th Cir. 1977) the Court of Appeals held that a defendant in setting forth a defense of selective or discriminatory prosecution must be allowed to demonstrate that his complaint might have merit, i.e. establishing, at least prima facie, the first prong of the rule laid down in United States v. Berrios, supra. Id, at 265. Petitioner believes he is at least entitled to the same opportunity, i.e. a chance to show that because of the nationality of his son, Respondent failed to prosecute his son's murderer.

III

A father has standing to bring an action under the Constitution and Civil Rights statutes against a state prosecutor who intentionally fails to prosecute the accused murderer of his son because of criteria such as the race, religion or

national origin of the father and son and where probable cause exists that the accused is in fact a murderer.

In Butz v. Economou, 438 U.S. 478 (1978), the Supreme Court held that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal question jurisdiction of the district courts to obtain an award of monetary damages against the responsible state official. Id, at 504. The Fourteenth Amendment forbids state officials from denying equal protection of the laws. State action which is nondiscriminary by its terms may constitute a de jure violation of equal protection if it is intentionally or purposefully applied in a discriminatory fashion. See Yick Wo. v. Hopkins, 118 U.S. 356 (1886). To withstand scrutiny under the equal protection clause, Classifications based upon race, religion, national origin or alienage must serve compelling

state interests. Thus, the equal protection clause confers on Petitioner Abdullah Dohaish and his deceased son, Saud Dohaish, a federal constitutional right to be free from discrimination based upon race, religion, national origin and alienage which cannot meet these requirements. It is true that statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner. The Constitution, on the other hand, does not partake of the prolixity of a legal code. See McCulloch v. Maryland, 4 Wheat 316, 407, 4 L.Ed. 579 (1819).

In Davis v. Passman, 442 U.S. 228 (1978), the Supreme Court held that in the absence of a textually demonstrable constitutional commitment of an issue to a coordinate political department, it is presumed that justiciable constitutional rights are to be

enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights. Id, at 242.

It is established practice for the Supreme Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the Fourteenth Amendment forbids the state to do. Bell v. Hood, 327 U.S. 678, 684 (1946). In appropriate circumstances, a federal district court may provide relief in damages for the violation of constitutional rights if there are no special factors counselling hesitation

in the absence of affirmative action by Congress. See Butz v. Economou, supra, at 504.

Petitioner Abdullah Dohaish clearly rests his claim directly on the Equal Protection Clause of the Fourteenth Amendment. Abdullah Dohaish claims that his rights and the rights of his son have been violated and that he has no effective means other than the judiciary to vindicate these rights. Clearly, Abdullah Dohaish is an appropriate party to invoke the jurisdiction of the district court to seek relief and has a cause of action under the Fourteenth Amendment.

A. 42 U.S.C. Section 1988.

In Robertson v. Wegman, 436 U.S. 584, the Supreme Court held that the decision as to the applicable survivorship is governed by 42 U.S.C. Section 1988. Section 1988 recognizes that in certain areas federal law

is unsuited or insufficient to furnish suitable remedies and does not cover every issue that may arise in the context of a federal civil rights action. Moor v. County of Alameda, 411 US 693, (1973). One specific area not covered by federal law is that relating to the survival of civil rights actions under Section 1983 upon death. Id, at 702 n. 14.

When federal law is thus deficient, Section 1988 instructs to turn to the common law, as modified by the Constitution and statutes of the forum state, as long as these are not inconsistent with the Constitution and laws of the United States. Robertson v. Wegman, supra., at 588. Regardless of the source of the law applied in a particular case, however, it is clear that the ultimate rule adopted under Section 1988 is a federal rule responsive to the need whenever a federal right is impaired. Moor v. County of Alameda, supra., at 703,

quoting Sullivan v. Little Hunting Park, Inc., 396 US 229, 240 (1969).

In resolving questions of inconsistency between the state and federal law raised under Section 1988, courts must look not only at particular federal statutes and constitutional provisions, but also at the policies expressed in them. Sullivan v. Little Hunting Park, Inc., supra, at 240. Of particular importance is whether application of state law would be inconsistent with the federal policy underlying the cause of action under consideration. Johnson v. Railway Express Agency, Inc., 421 US 454, 465 (1975).

The policies underlying Section 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power, by those acting under color of state law. Carey v. Piphus, 435 US 247, 254 (1978); Mitchum v. Foster, 407

US 225, 238-242 (1972); and Monroe v. Pape, 365 US 167, 172-187 (1961).

The applicable Colorado survivorship statute, Section 13-20-101(1), C.R.S. 1973, provides, in relevant part, as follows: "All causes of action . . . shall survive . . . the death of the person in favor of whom . . . such action has accrued . . ." . Suit is brought in spite of the injured party's death to prevent certain actions or causes of action already accrued from abating by reason of the death of either of the parties. Espinoza v. O'Dell, 633 P.2d 455 (Colo. 1981); Brown v. Stookey, 134 Colo. 11, 14, 298 P.2d 955, 957 (1956).

It is, therefore, clear that under the facts of the instant appeal, the Colorado survivorship statute is inconsistent with the underlying policies of Section 1983. Unlike the facts under Robertson v. Wegman, supra., where the decedent left no "close relatives" and where suit was continued by

the deceased's personal representative, Saud Dohaish is survived by close relatives, including his father. Although the goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased's estate, Id, at 592, the basis is provided if the father sues on behalf of his son. Id. As to the Section 1983 goal of preventing official illegality, since causes of actions accruing after the death of the injured party do not survive in Colorado other than those for wrongful death, the victims in all homicide cases could not bring suit for the acts complained of in the instant appeal, although non-homicide victims could. A state prosecutor would be absolutely free not to prosecute an accused in homicide cases, the most heinous variety, but would be compelled to recognize constitutional standards in deciding not to prosecute

an accused in non-homicide cases. This conclusion would be absurd on its face.

Since the Colorado law survives under the facts of the instant appeal only for the deceased's personal representative, only for actions occuring before the death of the injured party (deceased), Espinoza v. O'Dell, supra., at 466, it is clear that in a significant number of cases, i.e., all homicide offenses, the underlying policies of Section 1983 would be adversely affected. As the father, heir and personal representative of the late Saud Dohaish, it is clear that Petitioner has standing to sue Dale Tooley both in the capacity of heir and executor.

B. Fourteenth Amendment

In Stanley v. Illinois, 405 US 645 (1972) the Supreme Court held that the private interest of a father in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing

interest, protection from illegal state action. Id, at 650, 651. The due process clause of the 14th Amendment extends constitutional protections to the relationship between a father and his children. Id.

In Colorado, the heirs of the deceased have been denied the right to assert claims for damages under Section 13-20-101(1) 1973. See Espinoza v. O'Dell, supra., at 466. It would therefore appear that there is a violation of equal protection to deny fathers the right to bring such an action, where they have a private constitutionally protected fundamental liberty interest in their children, but to permit the personal representative to bring such an action on behalf of the deceased child. In other words, if a father has a private interest in the companionship, care, custody and management of his children separate and apart from the child's interest in himself while alive, the father should

also have a private interest separate and apart from that of the personal representative of his deceased child's estate, who, in Colorado, stands in the decedent's shoes in a state survival action. See, Espinoza v. O'Dell, supra., at 466; Publix Cab Co. v. Colorado National Bank, 139 Colo. 205, 338 P.2d 702 (1959) re the role of a deceased's personal representative.

Therefore, Abdullah Dohaish should have standing to sue both as the father and heir of Saud Dohaish as well as the executor of his son's estate.

CONCLUSION

It is clear that under the Constitution the judicial department is given the task of measuring the executive and legislative branches' adherence to constitutional standards. When a state prosecutor exercises his prosecutorial discretion by affirmatively prosecuting a defendant, the judicial department is and will be actively involved in

reviewing the constitutionality of such discretion. The remedial powers of the trial judge, and jury, appellate review and state and federal post conviction collateral remedies are available among others. However, the above checks are not available to review or correct a constitutionally infirm decision of a district attorney not to prosecute a defendant. Consequently, if there be no judicial review available, in such circumstances, the prosecutor will be the sole and final arbiter of whether the guilty are to be punished. The quasi-judicial role of the prosecutor was never intended to be an exception to the rule laid down as far back as Marbury v. Madison, supra. The judiciary itself must have the final word on stating what the law is.

Nearly a century ago the Supreme Court concluded that the administration of laws with an evil eye and an unequal hand, so as to

practically make unjust and illegal discrimination between persons in similar circumstances constituted a denial of equal protection of the laws. Yick Wo. v. Hopkins, 118 U.S. 356, 373-374 (1886).

Petitioner has alleged an abuse of discretion by Respondent in dismissing charges against the accused murderer of his son. Petitioner's allegation is based on the fact that he and his deceased son are Saudi nationals and that, because of their nationality, the law has not been applied equally by Respondent. The killer of Petitioner's son was arrested because the police officer involved had probable cause that a criminal offense had been committed and that the killer was the perpetrator of the crime. A preliminary hearing was conducted in the state court, and that tribunal had found probable cause to take the case to trial. However, upon Respondent's action, the charges were dismissed against the killer before he could be tried.

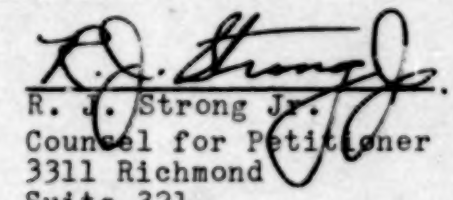
But for the fact that Petitioner and his son were Saudi nationals, Respondent would have vigorously prosecuted this case as was his duty.

The doctrine of Imbler v. Pachtman comes into play only when a prosecutor decides to prosecute because of the safeguards outlined in the argument.

In short, Petitioner has alleged invidious discrimination on the part of Respondent in choosing to dismiss the charges against the admitted killer of Saud Dohaish. Petitioner therefore requests that he be given the opportunity to show that in similar situations, Respondent has vigorously prosecuted defendants such as the killer of Saud Dohaish and has not sought to dismiss the charges against such defendants when probable cause at a preliminary hearing had been established. Petitioner is clearly able to prove a set of facts in support of his claim which would entitle him to

relief. For these reasons Petitioner respectfully requests that this court find that the judgements of the lower courts be reversed and this case be remanded for an evidentiary hearing.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner, Abdullah Dohaish, hereby certifies that on the 14 th day of May, 1982, three (3) copies of Petitioner's Petition for Writ of Certiorari were served upon counsel for Respondent, Patricia M. Ayd, by mailing the same to her at her address 1660 Lincoln Center Building, 1660 Lincoln Street, Denver, Colorado 80264.

R. J. Strong Jr.

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